Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES
_____ Term, 2004

CAPTAIN SHERIFF SAUDI,
Petitioner

V. CASE NO. 02-2023 5

MARINE TRANSPORT LINES, INC., Owner/Manager of the Vessel "Marine Atlantic;" MARINE TRANSPORT CORP., Owner/Manager of Vessel "Marine Atlantic"
Respondents

CONSOLIDATED WITH

CAPTAIN SHERIFF SAUDI,
Petitioner

V. CASE NO. 02-205 63

MARINE ATLANTIC, LTD., ACOMARIT SERVICES MARITIMES, S.A.; OSPREY ACOMARIT SHIP MANAGEMENT, INC.; KOCH SHIPPING, INC.; AND KOCH SUPPLY AND TRADING CO.
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

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QUESTIONS PRESENTED FOR REVIEW

QUESTION 1

DID THE DISTRICT COURT ERR IN DETERMINING THAT JURISDICTION OVER ACOMARIT SERVICES MARITIMES, S. A. AND MARINE ATLANTIC, LTD. DID NOT EXIST PURSUANTTO 28 U.S.C. 4(k)(2)?

QUESTION 2

WAS IT ERROR FOR THE DISTRICT COURT TO GRANT ACOMARIT'S, MOTION TO DISMISS FOR LACK OF PERSONAL JURISDICTION?

QUESTION 3

WAS IT ERROR FOR THE DISTRICT COURT TO GRANT MARINE ATLANTIC, LTD'S MOTION TO DISMISS FOR LACK OF PERSONAL JURISDICTION?

QUESTION 4

WAS IT ERROR FOR THE DISTRICT COURT TO GRANT KOCH SHIPPING INC.'S & KOCH SUPPLY & TRADING COMPANY'S MOTION FOR SUMMARY JUDGMENT ?

QUESTION 5

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In support of his Petition, Petitioner would respectfully show the following:

OPINIONS BELOW

Appendix A is a copy of the Decision of the U. S. Court of Appeals for the Fifth Circuit affirming the District Court's Decision.

Appendix B is The Final Judgment Pursuant to Fed.R.Civ.P. 54(b) as to Defendants Koch Shipping, Inc. and Koch Supply and Trading Company Ltd., n/k/a Koch Petroleum Group, L.P. dated April 10, 2002.

Appendix C is the Rule 54(b) Final Judgment dated January 24, 2002, as to Marine Transport Lines, Inc. and Marine Transport Corporation.

Appendix D is the Findings of Fact and Conclusions of Law supporting Rule 52c Judgment on Partial Findings dated January 24, 2002, as to Marine Transport Lines, Inc. and Marine Transport Corporation.

Appendix E is the Order dated November 8, 2001.

Appendix F is the Memorandum and Order dated July 23, 2001, which discusses the parties' arguments concerning personal jurisdiction under both Rule 4(k)(2) and the Texas Long Arm Statute.

Appendix G is the Memorandum and Order dated February 19, 2001.

Appendix H is the Memorandum and Recommendation dated January 26, 2001, striking Plaintiff's Experts.

Appendix I is the Order dated January 3, 2001

Appendix J is the Memorandum and Order dated December 21, 2000, dismissing Marine Atlantic Ltd., without prejudice, for lack of personal jurisdiction.

Appendix K is the Memorandum and Order dated December 19, 2000, allowing the filing of Saudi's Fourth Amended Complaint, and striking Saudi's jury demand.

Appendix L is the Memorandum and Order dated December 14, 2000, denying Marine Transport Lines, Inc.'s and Marine Transport Corporation's Motion for Summary Judgment.

Appendix M is the Memorandum and Order dated December 14, 2000 granting defendants' Motion for Partial Summary Judgment.

Appendix N is the Memorandum and order dated December 14, 2000.

JURISDICTION

The present appeal arises out of an Order of the United States Court of Appeals for the Fifth Circuit, affirming Final Orders and Judgment entered by the United States District Court for the Southern District of Texas, Houston Division. The Supreme Court of the United States has jurisdiction over this matter under 28 U.S.C. Section 1254(1).

SUMMARY OF THE CASE

This consolidated case presents several different fact records for review. The Motions for Summary Judgment, which the District Court granted in favor of Koch Shipping, Inc., and Koch Supply & Trading Company "KOCH", are governed by the summary judgment record, including various affidavits and documentary evidence. The record and transcript of testimony of the trial leading to the District Court's entry of a judgment on partial findings in favor of

Marine Transport Lines, Inc. and Marine Transport Corporation, establishes the facts for Saudi's appeal against Marine Transport Lines, Inc. and Marine Transport Corporation "MTL" and "MTC".

Last of all Marine Atlantic, Ltd. ("MAL") and Acomarit Services Maritimes, S.A. ("ACOMARIT") both filed Motions to Dismiss for Lack of Personal Jurisdiction. The facts which must be reviewed for that portion of this appeal are established by the affidavits and documentary evidence submitted by the parties in favor of, and in opposition to, those motions.

All of the Defendants (now Respondents) whom Saudi sued, have some involvement with the vessel, S/T Marine Atlantic. The technical managers were Acomarit and Marine Transport Corporation. The charterer/provider of the vessel was Koch. The observer/monitor was Osprey. The owner was MAL. The re-manufacturer / refurbisher was MTL.

The Newport News Shipyards Virginia fabricated the vessel, S/T Marine Atlantic in 1979. The vessel put to sea for approximately three years, and then was "laid up in saltwater anchor in Borneo" where it remained until early 1994. (Tr. Vol. 1, P 36, LL 16-25; P. 37, L 1). MTL put together a team including its chief engineer, Richard Farman, who "went out and had a look at the vessel" in an effort to formulate a plan to reactivate it. (Tr. Vol. 1, P.37, LL 11-25).

The vessel was then towed to Keppel Shipyards in Singapore, and a Singapore team, which MTL put together, supervised what turned out to be the refurbishment of the entire vessel, including a portside hose-handling crane. (Tr. Vol. 1, P. 38, LL 8-13).

The Singapore team observed Keppel Shipyards' employees performing the reactivation and they supervised the reactivation. (Tr. Vol.2, P. 93, LL 7-25). The MTL team was "...observing all the work that was done or as much as they could by the shipyards to

make sure it was done and that it was done properly and done according to the reactivation specifications." (Tr. Vol.2, P. 93, LL 18-25; P. 94, LL 1-12). After the portside hose crane was refurbished along with the rest of the vessel, the S/T Marine Atlantic put to sea, and MTC, one of its subsidiaries, technically managed the vessel from 1994 through January, 1996, when MTL "delivered" the vessel to Acomarit. (Tr. Vol. 1, P. 36, LL 3-15).

Some time prior to May 17, 1999, Koch chartered the S/T Marine Atlantic from MAL, and hired Saudi's employer, American Eagle Tankers, to go aboard that vessel to facilitate litering operations. (Record Vol. 9) # 9) P. 2794.

On May 17, 1999, while Saudi was being off lifted from the S/T Marine Atlantic to the tender boat, American Discovery, the boom arm of the portside hose crane located on the S/T Marine Atlantic failed catastrophically, dumped the personnel basket and Saudi into the Gulf of Mexico, struck the side of the vessel, fulcrum up against the pedestal, broke off, and followed Saudi into the Gulf. The lifting wire to the crane arm snapped and lashed Saudi partially severing his arm. Saudi suffered broken ribs, a punctured lung, a ruptured spleen, a broken arm; as well as various other injuries.

Later examination of the remaining crane parts revealed that a spline coupling of an engine shaft and drive shaft had failed due to unarrested corrosion, which allowed the two shafts to spin freely inside the coupling. MTL Trial Exhibit 30. Saudi's Trial Exh. 31 and 32. Saudi was lifeflown from another vessel to Galveston where he was hospitalized and then underwent surgery.

COURSE OF PROCEEDINGS BELOW

Saudi filed his Original Complaint against Koch, the charterer of the vessel, MAL, the owner of the vessel, Acomarit, the technical manager of the vessel at the time of his injury, MTL, the refurbisher of the vessel in 1994, MTC, the technical manager of the vessel after

refurbishment, and Osprey, the company whose employee, Thomas Garrett, inspected the crane in 1997, and failed to locate the defect. Saudi also sued Appleton Marine, Inc., Appleton Machine Company and Valmet Appleton, the successors to the original crane manufacturer in Appleton, Wisconsin. Acomarit answered and moved to dismiss for lack of jurisdiction on August27, 1999.

Koch filed a Motion for Summary Judgment on January 20, 2000. Saudi filed his Response to Koch's Motion for Summary Judgment on February 24, 2000. The District Court granted Acomarit's Motion to Dismiss for Lack of Personal Jurisdiction on January 31, 2000. Saudi moved for rehearing of the Court's January 31, 2000 order dismissing Acomarit on February 11,2000. Saudi also moved to compel Answers to Interrogatories. The District Court entered an order dismissing Saudi's claims against Koch Petroleum Group, L.P., without prejudice, and holding Koch Petroleum Group's Motion for Summary Judgment moot.

Koch moved to quash Saudi's Notice to Take Depositions and Subpoena Duces Tecum on May 9, 2000. Saudi filed a Motion to Compel Attendance at the Deposition of Witnesses, Robert Hamshaw and Greg Doyle, and for Production of Records on May 12, 2000. Saudi also filed a Motion to Compel Presence at Deposition of Koch's Designated Witness, R.E. Brown, with Production of Records on the same date. On May 16, 2000, the District Court denied Saudi's Motion to Compel Answers to Interrogatories and Motion for Leave to File Reply to Defendant Acomarit's Response and Motion for Leave to File Supplemental Materials and Authorities. The Court also denied Saudi's Motion for Rehearing of the Court Order dismissing Acomarit for lack of personal jurisdiction. This order also denied MTC's and MTL's Motion for Summary Judgment "without prejudice."

Marine Atlantic Ltd. (MAL) filed an Answer to the Complaint in a Motion to Set Aside the Default Judgment Previously entered on May 24, 2000.

Saudi filed a Motion to Compel Deposition of Osprey Acomarit's former employee, Tom Garrett, on August 24, 2000. Osprey filed an Opposition to Saudi's Motion to Compel Garrett's Deposition on August 28, 2000. MTL and MTC filed a renewed Motion for Summary Judgment on August 30, 2000. On December 14, 2000, the District Court entered an order denying MTL and MTC's Motion for Summary Judgment. Appendix L. On or about April 10, 2002, the District Court entered a Final Judgment as to Defendants Koch Shipping, Inc. and Koch Supply and Trading Company, Ltd., n/Ida Koch Petroleum Group, L.P. Appendix B. On January 24,2002, the District Court entered Findings of Fact and Conclusions of Law pertaining to its Judgment on Partial Findings and entered Final Judgment in favor of MTL and MTC. Appendix C and D.

On October 6, 2000, Saudi filed his Response to Koch's Motion for Summary Judgment Reply. Saudi also filed a Controvert Affidavit in Opposition to Koch's Amended Response Reply on October 6, 2000. On December 14, 2000, the District Court entered an Order granting Koch's Motion for Summary Judgment.

On November 1, 2000, the District Court referred Saudi's Motion to Compel the Deposition of Ospreys former employee, Tom Garrett, to the Magistrate Judge Stacy for resolution. On November 9, 2000, the Court entered an Order denying Plaintiffs Motion to Compel the Deposition of Osprey Acomarit's Former Employee, Tom Garrett, and Saudi's Motion to Compel Production of Employment Records. Saudi filed a Motion for Leave to Take the Depositions of Greg Doyle and Robert Hamshaw and requested expedited consideration on November 3, 2000. On November 3, 2000, MAL filed a Response to Plaintiffs Motion for Leave to Take the Depositions of Greg Doyle and Robert Hamshaw. On November 21, 2000, the District Court entered an Order granting Saudi's Motion for Leave to Take Depositions of Greg Doyle and Robert Hamshaw.

On August31, 2000, the District Court granted MAL's Motion to Set Aside the Default Judgment that had been entered against it. On

September 12, 2000, MAL filed a Motion to Dismiss for Lack of Jurisdiction. On October 2, 2000, Saudi filed his Response and Answer to MAL's Motion to Dismiss for Lack of Personal Jurisdiction. On December 21, 2000 the District Court entered an Order granting MAL's Motion to Dismiss for Lack of Personal Jurisdiction without prejudice. Appendix J. On January 2, 2001, Saudi filed a Motion for Rehearing of the Court's Order dismissing MAL for lack of personal jurisdiction.

Saudi filed his Notice of Appeal to the United States Court of Appeals for the Fifth Circuit. The Fifth Circuit Court of Appeals affirmed the District Court decision.

STATEMENT OF THE CASE

QUESTION 1

DID THE DISTRICT COURT ERR IN DETERMINING THAT JURISDICTION OVER ACOMARIT SERVICES MAR1TIMES, S. A. AND MARINE ATLANTIC, LTD. DID NOT EXIST PURSUANT TO 28 U.S.C. 4(k)(2)?

Saudi's Motion to Compel Deposition of Witness Tom Garrett contained pages of witness, William B. Gibbs', deposition testimony, N.R. 153, PP.2195 -2204. PP. 33 -39,40,51-52, which established that:

1. Gibbs identified Tom Garrett as an individual who was on Osprey's payroll but worked under the management instruction of Acomarit Geneva. Gibbs deposition, P. 33, LL 4-10. According to Captain Gibb's testimony, even though the joint venture between American Automar and Acomarit Holdings was dissolved, Tom Garrett was retained on the Osprey payroll for a period of time. Gibbs' Deposition, P. 33, LL 11-22. Acomarit reimbursed Osprey for Tom Garrett's salary because Tom Garrett "...worked for them...." Captain William Gibbs' Deposition, P. 33, LL 23-25; P. 34, LL 1-5. Tom Garrett performed no duties running Osprey's business. He

was a marine superintendent, a port captain for Acomarit's managed fleet and he attended various ships in various ports in North and South America for Acomarit. Gibbs Deposition, P. 34, LL 12-15.

2. Osprey kept Garrett on its staff as an employee because Acomarit wanted them to do it. Gibbs Deposition, P. 34, LL 22-25, P. 35, LL 1-6.

3. Garrett performed his work for Acomarit out of his house in Bethlehem or Nazareth, Pennsylvania. Gibbs Deposition. P.35, LL 7-18; P. 51, LL 2 1-25; P. 52, LL 1-7. According to Gibbs, when Garrett attended ships, Garrett would: audit System on board the ships.... Gibbs Deposition. P. 37, LL 8-14.

4. Gibbs used the word "visit" interchangeably with "attend." Garrett attended ships for Acomarit Services Maritimes, S.A. while they were in U.S. ports. Gibbs Deposition. P. 37, LL 20-25; P.38, LL 1-4. The ports where Garrett attended ships were "all over the country." Gibbs Deposition. P. 38, LL 1-4.

5. Gibbs admitted that Osprey paid Garrett's salary directly and never invoked the clause in the American Automar letter agreement which would require Acomarit to have advanced Garrett's salary in the first instance." Gibbs Deposition. P. 38, LL 16-24.

6. Garrett did not leave Osprey's employ until March 1, 1999, less than two months prior to Saudi's injuries. Captain William Gibbs Deposition. P. 39, LL 1-5. Osprey agreed to take on Garrett as Acomarit's clandestine employee when the Joint venture was formed on June 1, 1994. Gibbs Deposition. P. 39, LL 6-11.

7. Gibbs claimed that while Osprey had the "legal ability" to terminate Garrett, the practical ability to terminate him was held by Acomarit Services Maritimes, S.A. of Geneva. Gibbs Deposition. P. 39, LL 20-25; P. 40, LL 1-3.

During the deposition Garrett testified that he examined and tested the hose cranes aboard the Marine Atlantic and was unable to find any defect and that he was not aware that any portion of the manual paperwork concerning the crane was missing. N.R. 243, P. 3730 the deposition testimony established that Garrett was a paid employee of Osprey-Acomarit, but attended Acomarit's ships according to Acomarit's instructions. In Re: Atlantic Financial Management, Inc. 784 F.2d 29, 31(1st Cir. 1986).

Garrett, by his own admission, as Port Captain, was responsible for insuring cargo safety aboard the vessels he attended which included the Marine Atlantic. Garrett admitted that he visited the vessel Marine Atlantic "three or four times." Garrett performed a safety inspection and test of both cranes on the Marine Atlantic in 1997. Under these facts as admitted by Garrett, Acomarit, as the manager of the vessel, and MAL, as the owner of the vessel, had sufficient contacts with the United States to be held for jurisdictional purposes pursuant to 28 U.S.C. 4(k)(2).

QUESTION 2

WAS IT ERROR FOR THE DISTRICT COURT TO GRANT ACOMARIT'S, MOTION TO DISMISS FOR LACK OF PERSONAL JURISDICTION?

Absent any dispute as to the relevant facts, the issue of whether personal jurisdiction may be exercised over a nonresident Defendant is a question of law to be determined de novo by the Court of Appeals. Han v. La Cienega Music Co., 4 F.3d 413, 415 (5th Cir. 1993). On a Motion to Dismiss for Lack of Jurisdiction, uncontroversial allegations of the Plaintiffs Complaint must be taken as true, and conflicts between the facts containing the party's affidavits must be resolved in the Plaintiffs favor, for purposes of determining

Whether a prima facie case for personal jurisdiction exists. Bullion v. Gillespie, 895 F.2d 213, 217 (5th Cir. 1990). When Rule 4(k)(2)

F.R.Civ.P. is utilized as a basis for jurisdiction, the case "arises under" federal law. A federal mode of service of process may be utilized. U.S. v. Swiss American Bank, Ltd., 1999 WL 68573 (1st Cir., 1999), Busch v. Buchman, Buchman, and O'Brien Law Firm, 11 F.3d 1255 (5th Cir., 1994).

Saudi served written interrogatories and requests for Production seeking discovery from Acomarit months before the District Court's dismissal. Acomarit's counsel strung Saudi's counsel along exchanging letters agreeing to answer the discovery. When the District Court signed an order dismissing Acomarit for lack of personal jurisdiction, and Saudi filed a Motion to compel the overdue discovery and a Motion for Rehearing, Acomarit's counsel responded that Saudi should be denied relief because he did not file a Motion to Compel.

The District Court denied Saudi's Motion to Compel and Motion for Rehearing. Saudi's counsel reasonably awaited Acomarit's counsel's compliance with their written discovery agreements, which were never forthcoming. Saudi's counsel were not dilatory, and the District Court's reasoning was flawed. Wichita Falls Office Associates v. Banc One Corp. 978 F.2d 915 (5th Cir., 1992). A formal Motion to Compel Discovery is not required. Tamari v. Bache & Co. (Lebanon) S.A.L., 729 F.2d 469 (7th Cir. 1984).

Acomarit's obstructionist behavior, and its failure to comply with discovery requests, denied Saudi his right to obtain discovery relevant and material to Acomarit's jurisdictional motion before the District Court's dismissal. The evidence concerning Garrett's activities as an employee-agent, on behalf of Acomarit in the United States, was not "available" when the District Court granted Acomarit's jurisdictional motion on January 31, 2000. Russ v. Intematl. Paper Co., 943 F.2d 589 (5th Cir. 1991).

Acomarit made material jurisdictional misrepresentations. On P. 2 of its original Motion to Dismiss for Lack of Personal Jurisdiction

filed in the District Court, Acomarit's, through its counsel stated that Acomarit does not have offices in the United States or employees or officers who work or reside in the United States. Neither Acomarit, nor its counsel, ever retracted this statement from August 27, 1999, until January 31, 2000, when the District Court granted its motion.

It is now known that a joint venture existed in the past between Acomarit and principals of Osprey Ship Management, Inc. The joint venture, OspreyAcomarit Ship Management, Inc., was terminated in 31 December 1998.

On December 15, 1998, Thomas Nork, counsel for Acomarit and Osprey, sent a letter to Saudi's counsel on behalf of Osprey-Acomarit, which described termination of a joint venture between American Automar and Acomarit Holdings, which had been known as Osprey-Acomarit Ship Management ("OASM"). The letter referred to an individual that OASM would continue to employ and left the individual's name blank. Later on, at the compelled deposition of witness, William Gibbs, the name of the employee missing from the letter was revealed to be Tom Garrett, Acomarit's port captain who resided in Nazareth, Pennsylvania, and who officed in Bethesda, Maryland during the period of time from 1994 through early 1999.

In addition to the above discovery defaults and obstruction, Acomarit never produced a signed copy of the Charter contract between Koch and Marine Atlantic.

The obstructionist activities of Acomarit worked, because the District Court Judge entered an order telling Saudi that any further efforts to continue arguments that Acomarit should be included as a named Defendant in his case, after Saudi had been given extensive time to present a prima facie case of personal jurisdiction over Acomarit, would result in severe monetary sanctions.

The jurisdictional misrepresentation, i.e. that Acomarit had no em-

ployees or agents resident in the United States, made in the Motion to Dismiss signed by Acomarit's counsel, taints the finding of personal jurisdiction, even if the District Court Judge did not base her jurisdictional dismissal on Rule 4(k)(2) F.R.Civ.P. Bloome v. Selford Creek Resort, Inc., 749 F.Supp. 195 (S.D. Md., 1990).

Acomarit, through its Port Captain, Tom Garrett, who resided in Pennsylvania and officed in Bethesda, Maryland, had numerous contacts with the U.S. as the result of Garrett's activities. Proof of these activities could be used to establish personal jurisdiction over Acomarit under Rule 4(k)(2). Williamson v. Petrosakh Joint Stock Co., 952 F.Supp. 495 (S.D. Tex. 1997). Citing O'Ouinn v World Inves. Constructors, Inc., 68 F.3d 471(5th Cir. 1995). The actions of a joint venturer or the agent of a joint venturer are imputed to the joint venturers for jurisdictional purposes. McAleerv. Smith, 728 F.Supp. 857 (D.R.I. 1990). All of these decisions gave Acomarit ample incentive to mislead Saudi. Saudi did not have the opportunity for meaningful discovery of Garrett's activities before the Houston Court entered its dismissal.

Acomarit now claims that Judge Harmon's ruling as to 4(k)(2) jurisdiction, which it obtained before the revelation of Garrett's status as its port captain came to light, should be given res judicata effect as to Rule 4(k)(2) jurisdiction in the Federal District Courts of New York and Pennsylvania. In discovery in the Pennsylvania case Garrett confessed that he "had attended 15 vessels a year in U.S. ports on Acomarit's behalf, was reimbursed for expenses by Acomarit indirectly through payments to Osprey-Acomarit, and received a salary from Osprey-Acomarit by electronic transfer in his hometown of Nazareth, Pennsylvania." When pressed for the records reflecting his financial dealings with Acomarit, Garrett claimed he was required to send Acomarit the originals and did not retain copies.

Osprey utilized electronic transfer to move Garrett's salary from Maryland to Pennsylvania. Acomarit purportedly reimbursed Osprey for payment of Garrett' s salary.

When compelled to produce the records, Acomarit responded that it had none, indicating they were destroyed. All of these machinations deprived Saudi of a full and fair opportunity to try the issue of jurisdiction against Acomarit.

For the reasons discussed above, the District Court's order granting Acomarit's Motion to Dismiss for Lack of Personal Jurisdiction should be reversed. Saudi should be allowed to dismiss his Houston case against Acomarit, without prejudice, so that he may pursue Acomarit in Pennsylvania and New York. The District Court's order should be clarified in conformity with the District Court's September 5, 2000 order to reflect that only the Texas long arm jurisdiction does not exist over Acomarit.

QUESTION 3

WAS IT ERROR FOR THE DISTRICT COURT TO GRANT MARINE ATLANTIC, LTD'S MOTION TO DISMISS FOR LACK OF PERSONAL JURISDICTION?

Where the Court rules on (a jurisdictional motion) without an evidentiary hearing, the Plaintiff may bear his burden by presenting a prima facie case if personal jurisdiction is proper. Wilson v. Belin, 20 F.3d 644, 648 (5th Cir., 1994). Citing Thompson v. Chrysler Motors Corp., 755 F.2d 1162, 1165 (5th Cir. 1985).

In determining the Motion to Dismiss for lack of jurisdiction uncontroversial allegations in the Plaintiffs Complaint must be taken as true and conflicts between the facts contained in the parties' affidavit must be resolved in Plaintiffs favor for purposes of determining whether prima facie case of personal jurisdiction exists. Wilson at P. 648. Citing Bullion v. Gillespie, 895 F.2d 213, 215 (5th Cir. 1990).

MAL's Motion to Dismiss, which the District Court eventually granted, raised insufficiency of service of process, as well as alleged lack of personal jurisdiction, as grounds for dismissal. The District

Court first granted MAL's Motion to Set Aside Default and then entertained MAL's Motion to Dismiss. The Motion to dismiss that MAL filed, was limited to alleged lack of personal jurisdiction under the Texas long arm statute. It did not address, or mention, Saudi's jurisdictional claims against MAL under Rule 4(k)(2) of F.R.Civ.P. The Affidavit of Arthur Jones, submitted by MAL in support of its

Motion to Dismiss, denounced any jurisdictional contacts with the State of Texas, but did not mention United States contacts. When Saudi replied to the Motion, and pointed out this deficiency, MAL filed a "Reply" to Saudi's Response in which it claimed there was no basis for taking additional discovery, because Plaintiff had failed to serve MAL properly with service of process, thus defectively reasoning, in circular fashion, that no Rule 4(k)(2) jurisdiction could exist since MAL had not been properly served. MAL also argued that 4(k)(2) jurisdiction does not exist and Plaintiff is barred by res judicata or collateral estoppel from asserting that proper service occurred in this case. In addition, MAL asserted that Plaintiff failed to properly serve MAL within 120 days of the date of filing of the Original Complaint as required by F.R.Civ.P. 4(m) and did not move within that period for extension of time to serve process.

The District Court "agreed" with MAL'S arguments and dismissed Saudi's case. The District Court ignored the very teachings of this Court's authorities, which she cited. MAL never denied Saudi's Rule 4(k)(2) jurisdictional allegations but, instead, relied on the fact that it had not been served with process, so that it could defeat the application of that rule.

The deposition of Robert Hamshaw, taken in the Houston case shortly before the District Court's dismissal, established that MAL purports to be a foreign corporation with its principal place of business outside the United States. MAL's failure to deny Saudi's Rule 4(k)(2) jurisdictional pleadings is fatal to the District Court's dismissal. Uncontroversial assertions in jurisdictional pleadings must be taken as true. Asarco, Inc. v. Blenara, Ltd., 912 F.2d 784 (5th

Cir. 1990). Since MAL never controverted Saudi's allegations of Rule 4(k)(2) jurisdiction against it, but, instead, merely relied on insufficiency of service of process to defeat application of the rule, Saudi's allegations "must be taken as true." Wilson, 20 F.3d 648.

The District Court's adoption of MAL's arguments concerning supposed insufficiency of process and failure to serve the Complaint within 120 days lends no aid to MAL's position. The issue of insufficiency of service of process must be considered separately from the determination of personal jurisdiction. Dismissal of a Complaint on the ground that process has not been properly served is inappropriate when there exists the reasonable prospect that such service may yet be obtained. In such instances, the District Court should, at most, quash service leaving Plaintiff free to effect proper service. Umbenhauer v. Woog, 969 F.2d 25 (3rd Cir. 1992). Plaintiff had served Robert Hamshaw, as an agent of Marine Atlantic, Ltd. in New York. Since MAL was re-sued in the United States District Court for the Eastern District of New York, Hamshaw has suddenly remembered that MAL designated Alpha, the corporation for which he worked, as its agent for service of process in that state.

Nor should a Complaint be dismissed where the Plaintiff is likely to be successful in attempts to serve process where, as here, the 120 day time limit does not apply due to the "vagaries of foreign service" which prevent imposition of a 120 day time limit.

Woog at P. 31. Citing Montalbano v. Easco Handtools, Inc., 766 F.2d 737, 740 (2nd Cir. 1985). No 120 day time limit for service applied. MAL failed to deny, or to controvert Saudi's jurisdictional pleadings under Rule 4(k)(2) F.R.Civ.P., so the allegations had to be taken as true.

The District Court disregarded the dictates of Rule 4, by dismissing Saudi's Complaint. Woog at P.32. Woog directs that the Court of Appeals consider the Plaintiffs wishes in reversing an improvident dismissal. Any order by this Court should make it clear that the

District Court's improvident dismissal has no res judicata, collateral estoppel, or issue preclusion effect, because Saudi was denied a full and fair opportunity to litigate the issue of jurisdiction. Hardy v. Johns-Manvel Sales Corp., 681 F.2d 334, 338 (5th Cir. 1982).

This Court should reverse the District Court's order and remand this case with instructions to allow Saudi to dismiss his case against MAL before the southern District of Texas, so that he may pursue his case against MAL in the United States District Court for the Eastern District of New York, where it is presently pending.

QUESTION 4

WAS IT ERROR FOR THE DISTRICT COURT TO GRANT KOCH SHIPPING INC.'S AND KOCH SUPPLY AND TRADING COMPANY'S MOTION FOR SUMMARY JUDGMENT?

A review of the summary judgment record is de novo. BNG Music v. Martineza, 74 F.3d 87, 89, (5th Cir. 1996). Fact questions are reviewed in the light most favorable to the non-movant. Assan v. Lubbock Indep. Sch. Dist., 55 F.3d 1075, 1078 (5th Cir. 1995).

Koch chartered the vessel S/T Marine Atlantic, after vetting it, and entered into a separate contract with Saudi's employer, American Eagle Tankers ("AET"), whereby AET would provide mooring masters to conduct litering operations on vessels supplied by Koch. Koch directed AET to begin operations to facilitate the litering operation on the S/T Marine Atlantic that Koch had chartered from MAL.Saudi was the mooring master that was sent aboard to facilitate this operation, and was injured on May 17, 1999, when he was being offloaded by the S/T Marine Atlantic's portside hose handling crane to the tender vessel, American Discovery.

The charter agreement between Koch and MAL provided that Koch would have no liability for the condition of the vessel. The question on appeal is whether this unilateral agreement between Koch and

MAL is effective as against claims by injured third parties such as Saudi.

Koch moved for summary judgment on the following grounds:

(1) Koch Shipping, Inc. ("KSI") had no control over the vessel or its equipment, including the crane, at the time of the accident involving Plaintiff; and

(2) Koch Supply and Trading, Inc. ("KS&T") did not own, charter, control, operate, manage, inspect, test or service the vessel "S/T Marine Atlantic", or the crane at issue, therefore, KS&T owed no duty to Plaintiff and was not a proper party to the lawsuit.

Koch's claim that KS "had no control over the vessel or its equipment" is directly refuted by the deposition testimony of Koch's designated witness, R. E. Brown, who admitted that Koch "might have had personnel who remained onboard the vessel "S/T Marine Atlantic", and had the right of control under the charter contract. Koch personnel, Joseph Tan and Frances Tan, were responsible for monitoring the operations of the vessel and would have been aware that when the vessel "S/T Marine Atlantic" was first vetted by Koch, the Quadrennial inspection of the portside hose handling crane, required by the terms of the "S/T Marine Atlantic's" ship registry in Liberia, had not been performed. Contrary to Mr. Brown's representations, Koch exercised its right to inspect the ship, but it did a poor job.

The Affidavit of Captain Sheriff Saudi, as well as the deposition testimony of Marine Transport Lines' designated witness, Richard Farman, established that the certificates proving up a timely Quadrennial inspection of the crane in question should be part of the ship's documents. Due to lack of discovery, Koch's Motion for Summary Judgment was not "ripe for ruling" on any disputed fact issues concerning its exercise of control over the vessel, its equipment, or the crane.

Koch argued below that it was entitled to summary judgment, because of the indemnity provision in the charter contract with MAL, and the provision stating that it had no control over the vessel. The mere fact that Koch claims to be a time charterer, even if such claim is true, should not protect Koch from Saudi's claims of negligence arising under the common law.

The liability at issue here is not the liability between the Charterer, the ship owner, or the vessel's crew, or the unseaworthiness doctrine, which is applicable to the owner and manager of the vessel, but instead, Koch's liability resulting from its vetting (inspection) of the vessel which would have revealed, or should have revealed, the dangerous condition of the portside cargo hose handling crane that injured Saudi.

Section 324A of the Restatement of Torts (Second) states:
That a party that undertakes to render services to another which he should recognize as necessary for the protection of a third party is subject to liability to the third person for physical harm resulting from the failure to exercise reasonable care if the failure increases the risk of harm, or the undertaking, entails the assumption of a duty owed by the other to the third person, or the harm was suffered because of reliance by the third party upon the undertaking" (P. 317, Thirteen ALR 289 - Breach of Assumed Duty to Inspect Article).

By its own admission, Koch "vetted" the vessel "SIT Marine Atlantic", and that process included safety inspections. The Supreme Court of the United States in U.S. v. S.A. Empresa de Viacao Aerea Rio Grandense, 104 S. Ct., 2755 (1984) acknowledged this rule, and referring to it as the "Good Samaritan" doctrine, noted that Federal Court should "accord great deference to the interpretation, and application of state law by the Courts of Appeals...." Empresa de Viacao at P. 2765, Note 12.

Section 403, the Restatement of Torts (Second) holds: That one providing a chattel known to be dangerous for the use of another may be

held liable for injury as are those under Section 405 of Restatement Torts Second directly through a third person give or lend the chattel for another to use knowing or having reason to know that it is or that it is likely to be dangerous for the use it is given or lent.

Koch knew or should have known of the dangerous condition of the cargo hose cranes, i.e. Koch had no proof that the cranes were certified to carry personnel safely and that the cranes were vetted, inspected, or surveyed, on the Quadrennial basis which the Koch witness, R. E. Brown admitted, was required. Under these circumstances, Koch had a duty to warn Saudi of such dangers irrespective of whether the inspection was performed gratuitously. Reese v. Mercury Marine Division of Brunswick Corp~, 793 F.2d 1416 (5th Cir. 1986) Section 324A Restatement of Torts (Second).

Saudi's affidavit established that he, as well as his employer, American Eagle Tankers, relied on the Koch Defendants' reputation in the industry in allowing him to be lifted aboard the vessel that Koch chartered. Koch's vetting program, disclosed to both managers/owners and shipping People, according to R. E. Brown, were the basis for this reputation. Since Koch undertook the vetting, Koch had a duty to perform such vetting competently. Koch did not do so and was, therefore, liable to Saudi for negligence and failure to warn.

Since Koch employees were present on the "S/T Marine Atlantic" during its operations under the alleged time charter, and since Koch knew, or should have known, at the time it vetted the ship, that the cranes were in dangerous condition, because they lacked Quadrennial inspection certificates, and were not certified to carry personnel safely, there is no conceivable "superseding cause" which prevents the Koch Defendants from being held directly liable for Saudi's injuries. Colburn v. U.S., 45 F. Supp. 2d 787, 792 (S.D. Cal. 1998). Citing Section 404 Restatement of Torts (Second).

The Fifth Circuit refused to apply the above sections of the Restatement of Torts in a maritime context, even though the Fifth Circuit

and other Federal Courts have adopted Sections 388- Section 393 of the Restatement of Torts (2nd) as part of the Maritime Law of Products Liability. The Fifth Circuit adopted Sections 388 and 392 of the Restatement by holding the United States liable as the supplier of a dangerous chattel. Citing Merklin v. United States. 788 F.2d 172(3rd Cir. 1986).

In Rich the Third Circuit struggled with the question of whether a party (such as Koch) that supplies a chattel (vessel) to an independent contractor (AET) for use by that contractor's employees (Saudi) should be held liable under the sections of the Restatement pertaining to premises liability and the tests for invitee(s) or licensees or under Sections 388 through 393 governing liability for suppliers of chattels. The majority of the Third Circuit Panel in Rich imposed liability under Sections 343 and 343(a) of the Restatement of Torts (Second) governing liability of possessors of land.

Clearly Sections 388-393 of the Restatement of Torts (Second) have been adopted in Maritime cases. Koch supplied the defective chattel (the vessel) to Saudi's employer (AET) and may be held liable for Saudi's injuries under the Restatement of Torts (Second) Sections already relied on by Saudi including Section 388 and 392. In Willey v. Minnesota Mining & Mfg. Co., 755 F.2d 315 (3rd Cir. 1985), Judge Weis held: "Section 392 specifies that the allegedly defective chattel should be one that is to be used in the supplier's business. The supplier becomes liable if he fails to exercise reasonable care to make the chattel safe or discover its dangerous condition".

Section 392 imposes liability on the supplier of a chattel if the supplier fails to exercise reasonable care to make the chattel safe for the use for which it is supplied, or if he fails to exercise reasonable care to discover its dangerous condition or character and to inform those whom he should expect to use it. Section 392 of the Restatement has been the law in Texas since Olivier v. Snowden, 426 S.W. 2d 545, 549-550(S.Ct.Tex.1968).

The District Court erred when it entered summary judgment in favor of Koch. The Fifth Circuit opinion and judgment should be reversed and the cause remanded for trial.

QUESTION 5

DID THE DISTRICT COURT ERR IN ENTERING JUDGMENT ON PARTIAL FINDINGS IN FAVOR OF MTL AND MTC?

The District Court, in denying Saudi any recovery for his serious injuries against MTL, the company that supposedly "managed" the refurbishment of the failed crane less than five years before the date of the collapse, relied on the testimony of MTL's technical director. The Court found that Farman's testimony was the Only evidence relevant to the issue of whether MTL was liable other than the far less comprehensive testimony of Greg Doyle, the chartering manager of ISM, which did not contradict Farman's testimony.

The legal validity of the District Court denial of any compensation to Saudi thus hinges upon Farman's testimony which must be "internally consistent and (not) contradicted by extrinsic evidence." Anderson v. Bessemer City, 470 U.S. at 575, 105 S.Ct. at 1512.

In light of the District Court's reliance on: (1) Farman's personal knowledge about the evaluation process; (2) his substantial experience, and (3) very credible testimony, the District Court was faced with the following operative facts: At the time of the 1994 refurbishment, Farman held a combined chief engineer's license for steam and diesel vessels with unlimited tonnage issued by the British Department of Trade. Farman had previous experience with refurbishment and reactivation of merchant vessels. Farman had previous experience working with cranes installed on bulk carriers or dry cargo lines in the 1970's. Prior to 1994 Farman had no previous experience with hydraulic cranes. Farman was not well trained in design.

"If a design problem was sensed, the technical manager would most

likely go back to the manufacturer of the equipment if they were still in business to see if there had been any advances since the equipment was manufactured." Prior to 1994, Farman had experience in breaking down derrick cranes or cranes. The classification society surveyor has the discretion to determine whether the internal parts of a crane should be opened up on inspection. Corrosion in the spline coupling caused one of the shafts to spin free, and the crane that was carrying Saudi to collapse. When two ends of a shaft are inserted into a round pipe that is what is turned a coupling. The corrosion in the spline coupling that failed causing Saudi's injuries destroyed the teeth on one of the shafts and couplings so that the teeth did not run longitudinally all the way across the dividing line or median.

External and internal teeth in the spline coupling are designed to lock together to make two metal pieces into one shaft. The white paint that can be seen on one of the shaft ends inside the coupling is marine paint with corrosive resistant qualities. The paint is used to stop corrosion or to prevent it. The shafts joined in the coupling served as one shaft and drove the drum that rolled the wire up and down and provided locomotion for the crane arms. The manufacturer of the crane specified that: "...At assembly the coupling's sleeve should be drilled in tact with two set screws. The purpose of a set screw is to go through and lock the assembly."

The buildup of corrosion in the coupling in this crane would be very dangerous because the coupling is a load bearing part. Corrosion is sensitive not only to movement, but also to vibration. Farman admitted that his visual inspection of the corroded spline coupling part in the courtroom proved that corrosion had caused the boom arm to fail. One of the internal shafts of the spline coupling had little corrosion while the other shaft was heavily corroded indicating that something was done to interfere with the corrosion on one of the shafts.

Q. .. . One of them is greased or something was done to interfere with the corrosion? Correct?
A. "That is a very reasonable assumption." (Tr. Vol. 3, P. 54, LL

19-25; P. 55, L I).

The spline shaft that was mostly intact, had been greased or had a grease coating. The black residue indicated a very old grease coating. If there was access to grease one shaft inside the spline coupling, there was access to grease the other. The position of the two shafts allowed common greasing since access to one is access to the other. If the parts to the spline coupling were exposed by dismantling or open for any reason, maintenance should have been carried out before it was reassembled. If the engine driving the crane had been taken out, both shafts inside the spline coupling could have been greased.

Farman was the manager at MTL responsible for what he termed to be the reactivation of the Marine Atlantic. In 1994 Farman did not look at the drawing of the portside hose crane "...in any detail....". The crane manual was used in preparing the specification for reactivation. Farman conceded he had to be concerned about moving parts that were corroded on the vessel as part of the standard in the industry of reactivation in the 1990's.

S/T Marine Atlantic's sister ship, the SIT Marine Pacific, had been operating for 18 months as of 1994, had identical cranes, and was having operational problems with the cranes. Reactivation is more extensive than repair. Reactivation may require design change or modification. There had been problems with the cranes on board the S/T Marine Atlantic since the shipyard days in Newport News, VA. (Tr. Vol. 3, P. 87, LL 1-24). Using a crane to lift Saudi aboard and off board the S/T Marine Atlantic to a tender vessel was normal industry practice. (Tr. Vol. 3, P. 89, LL 9-13). The motor in the portside crane was replaced and swapped with a new motor. (Tr. Vol. 3, P. 89, LL 14-19).

The original manufacturer of the portside hose crane on the Marine Atlantic was never contacted during or after the reactivation to determine how long a life could be expected from the crane gear and

the internal parts. (Tr. Vol. 3, P. 90, LL 9-13). Farman reiterated his stance at deposition that he thought it unlikely that an American Bureau of Shipping lifting test could have been performed on the crane successfully six months before it collapsed while carrying Saudi. (Tr. Vol. 3, P. 99, LL 12-25; P. 100, LL 1-100). When you add grease, corrosion is reduced. (Tr. Vol. 3, P. 140, LL 16-24). If a grease fitting had been installed in 1994, the crane collapse would not have occurred. (Tr. Vol. 3, P. 143, LL 6-17; P. 144, LL 1-8). Unless the splines were already in deteriorated condition in 1994, if grease had been introduced in 1994 on to the exterior spline, the catastrophe would not have happened on May 17, 1999. (Tr. Vol.3, P. 144, LL 14-19). The Singapore team was paid by Marine Transport Lines, Inc. and Marine Transport Lines, Inc. was reimbursed by the owner of the vessel (MAL). (Tr. Vol.3, P. 145, LL 4-7). Farman and the technical office at MTL made the ultimate decisions of the reactivation. McFarland and Charles Covert, purported owners' representatives, reported to Farman. (Tr. Vol. 3, P. 145, LL 8-13).

As of 1994, the spline coupling installed on the crane that injured Saudi was a defective design under the standard of the industry. (Tr. Vol.3, P. 149, LL 15-25). The design of the spline coupling was bad even by 1900 turn- of-the-century standards. (Tr. VoL 3, P. 150, LL 4-17). Farman admitted that the technical manager has to take over from the manufacturer in order to keep the machinery safe. (Tr. Vol.3, P. 151, LL 19-25; P. 152, LL 1-9).

This finding cannot be squared with Farman's admission that the crane manual had a drawing that identified the coupling and identified it as such in the Index. If Messrs. Farman and his inspection team did not know of the existence of the coupling, they should have. The manufacturer of the crane knew of the existence and location of the coupling but, unfortunately, was not consulted.

The District Court made the finding that all of the evidence suggests that the failure of the coupling was an unpredictable freak accident. R.E. 12, P.9. (Tr. Vol. 3, P. 75, LL 12-25; P. 76, LL 1-8). This

finding ignores Farman's frank concession that corrosion can be arrested through the simple expedient of introducing grease into the coupling. That which is capable of being arrested by the hand of man cannot be, and is not an uncontrollable act of God. Also since a visual inspection of the outside of the coupling would have shown that it did not comport with the manufacturer's specifications, the failure was far from "unpredictable".

The Court's finding that Farman's testimony was uncontroversial is contradicted by Greg Doyle who testified that MTL employees observed Keppel Shipyards' employees performing the reactivation and they supervised Keppel Shipyards. (Tr. Vol. 2, P. 93, LL 7-25).

Farman's testified that in light of the catastrophic failure of the crane in May, 1999, successful performance of a December, 1998 test was "highly unlikely." (Tr. Vol.3, P.91, LL 12-19). Richard Farman testified that he believes corrosion caused the crane boom arm to fall.

The trial Courts finding of no negligence cannot be squared with the evidence that the spline coupling was not in the condition required by the manufacturer, and was, presumably, opened for access when the engine of the portside hose crane was swapped as Farman described.

The District Court finding that MTL had a limited management role relating to the S/T Marine Atlantic on behalf of the owner totally ignores Farman's concession that he managed reactivation and sent Keppel Shipyards the reactivation specifications as to what would be done on the vessel, and Doyle's testimony that the team reporting to Farman supervised the Keppel Shipyard employees carrying out the reactivation, but the final decisions were made by Farman's office. All of the above-recited evidence cannot be squared with the findings that attempt to deny Saudi any recovery.

The record establishes that MTL engages in reactivation and refurbishment of vessels as a business. The contrary finding by the trial Court ignored Popov's testimony that MTL and MTC and their

subsidiaries are actively refurbishing ships for profit as a sideline of their business. (Tr. Vol. 1, P. 94, LL 4-15; P.95, LL5-11).

If MTC and MTL are liable for negligence under the general maritime law for failure to act reasonably and prudently under existing circumstances.

The relationship of MTL and MTC to the S/T Marine Atlantic that would give rise to a duty of care is that of a repairer, refurbisher, and remanufacturer of marine vessels, who knows, or should know, that any seamen, pilots, or masters, using a vessel which they fail to make safe during reactivation, refurbishment, or remanufacture, would be subjected to loss of life and limb.

The trial Court and the Fifth Circuit ignored Farman's, Popov's, and Doyle's testimony that MTL provided a reactivation plan to Keppel Shipyards, supervised and/or managed Keppel Shipyards in completing the repairs to the vessel and then placed the defective crane in the stream of maritime commerce where it could injure Saudi.

The finding of no negligence Conclusion of Law ignores the contrary facts that the coupling was not in a condition approved by the manufacturer as of 1994, when MTL and Farman carried out their reactivation. Furthermore, the collapse of the crane itself, within the scope of its foreseeable use, is evidence of a defect.

On this record, the District Court's judgment on partial findings in favor of MTC and MTL should be reversed, and judgment in favor of Saudi should be entered on the question of liability with remand for proof of damages. In the alternative, a new trial should be granted.

QUESTION 6

DID THE DISTRICT COURT ERR IN FINDING THAT CORROSION WAS AN ACT OF GOD?

The District Court made the finding that all of the evidence suggests that the failure of the coupling was an unpredictable freak accident. This finding ignores Farman's frank concession that corrosion can be arrested through the simple expedient of introducing grease into the coupling. That which is capable of being arrested by the hand of man can, and is not an uncontrollable act of God.

A visual inspection of the outside of the coupling would have shown that it did not comport with the manufacturer's specifications, the failure was far from "unpredictable" even by those not charged with the duty of redesigning or enhancing up to present standards during refurbishment Todd Shipyards Corp. v. Turbine Service, Inc., 467 F.Supp. 1257 (1978)

This finding also ignores Farman's testimony that in light of the catastrophic failure of the crane in May, 1999, successful performance of a December, 1998 test was "highly unlikely." (Tr. Vol. 3, P. 91, LL 12-19). Richard Farman also testified that he believes corrosion, not GOD, caused the crane boom arm to fall. The District Court's finding cannot be squared with the evidence that the spline coupling was not in the condition required by the manufacturer, and was not properly repaired at the time of reactivation and refurbishment by MTL.

REASONS FOR ALLOWANCE OF THE WRIT

1. Rule 4K(2) requires full jurisdictional discovery prior to a dismissal for alleged lack of personal jurisdiction.

2. The U. S. Court of Appeals for the Fifth Circuit applied the wrong test of evidentiary review in an admiralty case by refusing to apply principles of land-based liability set out in the Restatement of Torts.

3. The legal test to establish personal jurisdiction under 28 USC F.R.Civ.P.4 (k)(2) is an issue of grave national importance.

4. The District Court and the U. S. Court of Appeals for the Fifth Circuit holding in an admiralty context that corrosion is an "Act of God" is pure error, and violates the Admiralty jurisprudence of this Court.

5. The U. S. Court of Appeals for the Fifth Circuit failure to apply land-based rules of negligence and products liability in Maritime cases conflicts with prior decisions of this Court.

CONCLUSION

Based on all of the above arguments, the judgment on partial findings in favor of MTL should be reversed, judgment should be entered against MTL, and in favor of Saudi, or thecase should be remanded for a new trial. The judgments and dismissal for lack of personal Jurisdiction in favor of the Defendants, Acomarit, MTL and MAL, should be reversed, and remanded with instructions to allow Saudi to dismiss his claims in the Southern District of Texas and to pursue such claims in other Courts of appropriate jurisdiction. The summary judgment in favor of Koch should be reversed and this cause remanded with instructions that a new trial shall take place.

Respectfully submitted,

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